

SENATE BILL 2309

By McNally

AN ACT to amend Tennessee Code Annotated, Section 47-31-102; Section 47-31-103; Section 67-4-1028; Section 67-4-1029 and Title 67, Chapter 4, Part 26, relative to enforcement of the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 47-31-102, is amended by deleting subdivision (10) in its entirety and by substituting instead the following language:

(10) "Units sold" means the number of individual cigarettes sold to a consumer in the state by the applicable tobacco product manufacturer, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, during the year in question regardless of whether the state excise tax was due or collected. "Units sold" shall not include cigarettes sold on federal military installations or that are otherwise exempt from state excise tax pursuant to federal law. For purposes of this part, regarding cigarettes for which the state cigarette or other tobacco product tax is paid, such cigarettes shall be deemed as being sold to a consumer upon the affixing of the state cigarette tax stamp or, for roll your own tobacco, when the state tax on other tobacco products is paid.

SECTION 2. Tennessee Code Annotated, Section 47-31-103(a)(2), is amended by inserting the following language as new subdivisions following subdivision (A) and by redesignating the subsequent subdivision accordingly:

(B) The escrow fund deposits required by this section shall be made in quarterly installments following the quarter in which sales took place. For purposes of this section, the calendar year shall be divided into the following quarters: January 1 through March 31; April 1 through June 30; July 1 through September 30; and October 1 through

December 31. Deposits for sales for each quarter shall be made according to the following schedule:

(i) Deposits for sales occurring in the first quarter, January 1 through March 31, are due April 30 of the same year. A certification of the first quarter deposit shall be filed with the attorney general and reporter no later than May 15 of the same year;

(ii) Deposits for sales occurring in the second quarter, April 1 through June 30, are due July 31 of the same year. A certification of the second quarter deposit must be filed with the attorney general and reporter no later than August 15 of the same year;

(iii) Deposits for sales occurring in the third quarter, July 1 through September 30, are due October 31 of the same year. A certification of the third quarter deposit shall be filed with the attorney general and reporter no later than November 15 of the same year; and

(iv) Deposits for sales occurring in the fourth quarter, October 1 through December 31, are due January 31 of the following year. A certification of the fourth quarter deposit shall be filed with the attorney general and reporter no later than February 15 of the year following the year in which the cigarettes were sold;

(C) For each of the quarters, the quarterly deposit shall be based upon units sold; in that quarter together with an estimated inflation adjustment provided by the attorney general and reporter. An annual reconciliation deposit shall be made on or before April 15 of the year following the year in which the cigarettes were sold to account for the actual annual inflation adjustment. A statement of the reconciliation deposit and the final reconciled deposit figures shall be included with the annual certification, due on or before April 30 of the year following the year in which the cigarettes were sold. Additionally, the annual certification required under § 67-4-2602 shall include the final reconciled deposit figures.

SECTION 3. Tennessee Code Annotated, Section 47-31-103(a)(3), is amended by deleting the following language:

Each tobacco product manufacturer that elects to place funds into escrow pursuant to subdivision (a)(2) shall annually certify to the attorney general and reporter that it is in compliance with subdivision (a)(2). The attorney general and reporter may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this section shall:

and by substituting instead the following language:

Each tobacco product manufacturer that elects to place funds into escrow pursuant to subdivision (a)(2) shall certify on a quarterly and annual basis to the attorney general and reporter that it is in compliance with subdivision (a)(2). The attorney general and reporter may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this section. Any tobacco product manufacturer that fails to place into escrow the funds required under this section shall:

SECTION 4. Tennessee Code Annotated, Section 47-31-103(b), is amended by deleting the subsection in its entirety and by substituting instead the following:

(b) Each failure to make a quarterly or annual deposit required under this section constitutes a separate violation.

SECTION 5. Tennessee Code Annotated, Section 67-4-1028, is amended by deleting the section in its entirety and by substituting instead the following:

67-4-1028.

(a) Notwithstanding any law to the contrary, the commissioner shall, upon request, disclose to the attorney general and reporter, or any attorney working under the attorney general and reporter's supervision and control, information obtained by the commissioner that is relevant to the enforcement of the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999, compiled in title 47, chapter 31. The commissioner, the attorney general and reporter, or any attorney working under the attorney general and reporters supervision and control, may disclose information provided under this section that may otherwise be confidential:

(1) In discharge of the duty to enforce or defend the provisions of this part or the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999;

(2) In the course of any litigation, arbitration, or proceeding related to the Tennessee Tobacco Manufacturers' Escrow Fund Act of 1999, the Tobacco Master Settlement Agreement, or the NPM Adjustment Settlement Agreement; or

(3) In complying with provisions in the NPM Adjustment Settlement Agreement related to a data clearinghouse.

(b) Any tobacco sales data provided by another state, a tobacco product manufacturer, or other person or entity to a data clearinghouse pursuant to the NPM Adjustment Settlement Agreement that is also provided to the commissioner pursuant to that agreement, shall be treated as confidential tax information as defined in § 67-1-1701. This subsection (b) only applies to information received by the commissioner solely as a result of the NPM Adjustment Settlement Agreement.

SECTION 6. Tennessee Code Annotated, Section 67-4-1029, is amended by deleting the section in its entirety and by substituting instead the following:

67-4-1029.

(a) As used in this section:

(1) "Cigarette" has the same meaning as in § 47-31-102; and

(2) "Person" means and includes every individual, partnership, firm, association, corporation, limited liability company, joint-stock company, state, political subdivision, Native American tribe, tribal government or subdivision, or any other entity, group, or syndicate.

(b) Except for sales to licensed wholesale dealers and jobbers, it is unlawful for any person to cause cigarettes either ordered by or through or purchased by or through the mail, a delivery service, the Internet, telephone, or some other electronic method to be shipped or transported to any person in this state without such products having the appropriate Tennessee tax paid by a licensed wholesale dealer and jobber pursuant to the rates set forth in §§ 67-4-1004 and 67-4-1005.

(c) After becoming a licensed wholesale dealer and jobber pursuant to § 67-4-1015, the wholesale dealer and jobber may sell cigarettes to state retail dealers after applying the appropriate tax stamp to all packs of cigarettes sold, and after paying the appropriate tobacco tax on roll your own tobacco products.

(d) It is unlawful for a wholesale dealer and jobber or a distributor to sell cigarettes directly to a consumer located within the state.

(e) Retail dealers may receive and sell directly to state consumers cigarettes, including roll your own tobacco products, provided that a wholesale dealer and jobber has paid the Tennessee tobacco tax on the products.

(f) In addition to any act that may be taken by the commissioner to enforce this section, the attorney general and reporter may bring an action to prevent or restrain violations of this section by any person, or any person controlling such person. Such action may be brought in Davidson County circuit or chancery court or any competent jurisdiction in the county where the alleged violation of this part took place or is about to take place, or in a county in which such person resides, conducts, transacts or has transacted business, or in the county in which such person can be found.

(g) In addition to other remedies available pursuant to law, regulation, or rule, the attorney general and reporter may also seek the following:

(1) Orders and statutory injunctions to prevent violations of this section. Such orders and injunctions shall be issued without bond being given by the state, and shall be statutory injunctions requiring a substantial showing that the non-moving party is violating or has violated this section. In seeking such orders and injunctions, the attorney general and reporter is not required to show a likelihood of irreparable harm;

(2) An order temporarily or permanently revoking a license or certificate authorizing the person to engage in business in this state;

(3) A civil penalty of up to five thousand dollars (\$5,000) for each violation of this section. For purposes of this subdivision (g)(3), each shipment or transport of cigarettes constitutes a separate violation; or

(4) A civil penalty of up to ten thousand dollars (\$10,000) for each and every knowing violation of the terms of an injunction or order issued under this section.

(h) When considering the amount of civil penalties to be awarded under this section, the court should give weight and consideration to the following factors:

- (1) Whether the violation is intentional;
- (2) The good or bad faith of the violator;
- (3) Whether the person engaged in the prohibited act has violated any laws, regulations or rules relating to tobacco;
- (4) The violator's ability to pay;
- (5) The amount, number, volume, weight, cost, or other measure of cigarettes involved in the violation;
- (6) The number of packages or mailings involved in the violation;
- (7) Whether the violation is an isolated act or part of a sequence or series of violations;
- (8) The potential injury to the public;
- (9) The public's interest in eliminating the benefits derived by the violators from the violations; and
- (10) The need to deter future violations.

(i) In any successful action initiated by the attorney general and reporter, the court shall order reimbursement to the attorney general and reporter for the reasonable costs and expenses of investigation and prosecution of actions under this section, including attorneys' fees.

(j) Nothing in this section shall be construed to directly or indirectly modify or amend any aspect of any provisions of the Tennessee Tobacco Manufacturers Escrow Fund Act of 1999, compiled in title 47, chapter 31, or the

related provisions regarding the tobacco settlement funds, compiled in part 26 of this chapter.

(k) Unless otherwise expressly provided herein, the remedies and penalties provided by this section are cumulative and supplemental to each other and to the remedies and penalties available under any other laws, regulations or rules.

SECTION 7. Tennessee Code Annotated, Section 67-4-2601, is amended by adding the following new, appropriately designated subdivisions:

() “Cigarette rolling machine operator” has the same meaning as in § 67-4-1001;

() “Delivery sale” has the same meaning as in § 67-4-1001;

() “Importer” means any person in the United States to whom cigarettes manufactured in a foreign country are shipped or consigned or any person who removes cigarettes for sale or consumption in the United States from a customs bonded warehouse;

() “Retail dealer” has the same meaning as in § 67-4-1001;

() “Tobacco distributor” has the same meaning as in § 67-4-1001;

() “Wholesale dealer and jobber” has the same meaning as in § 67-4-1001.

SECTION 8. Tennessee Code Annotated, Section 67-4-2604(b), is amended by adding the following language after the second sentence:

Additionally, the commissioner and attorney general and reporter may share information pursuant to § 67-4-1028(a).

SECTION 9. Tennessee Code Annotated, Title 67, Chapter 4, Part 26, is amended by adding the following language as new sections:

67-4-2608.

(a) The department is authorized to conduct inspections, audits, and investigations of:

- (1) Non-participating manufacturers and their importers;
- (2) Licensed agents;
- (3) Tobacco distributors;
- (4) Wholesale dealers and jobbers;
- (5) Retail dealers;
- (6) Persons or entities engaged in delivery sales; and
- (7) Cigarette rolling machine operators to determine compliance with § 47-31-103 and this part.

(b) The commissioner, or a designee, and the attorney general and reporter, or a designee, are authorized to administer all necessary oaths, issue subpoenas, compel the attendance of witnesses, take depositions within and without the state, and compel the production of pertinent books, payrolls, accounts, papers, records, documents, and testimony relevant to such investigation.

(c) Every non-participating manufacturer, importer, licensed agent, tobacco distributor, wholesaler dealer and jobber, retailer dealer, person engaged in delivery sales, and cigarette rolling machine operator shall permit the commissioner or the commissioner's authorized agent or representative to inspect at any time all tobacco products, invoices, books, papers and memoranda, including the general books, both operating and proprietary ledgers, and other records, as may be deemed necessary by the commissioner in ascertaining compliance with § 47-31-103 and this part. Every cigarette rolling

machine operator shall permit the commissioner or the commissioner's authorized agent to inspect the operator's cigarette rolling machine at any time.

(d) No non-participating manufacturer, importer, licensed agent, tobacco distributor, wholesaler dealer and jobber, retailer dealer, person engaged in delivery sales, or cigarette rolling machine operator shall be permitted to claim any part of the premises whereon the non-participating manufacturer, importer, licensed agent, tobacco distributor, wholesale dealer and jobber, retailer dealer, person engaged in delivery sales, or cigarette rolling machine operator is engaged in business, to be exempt from inspection, as being the dwelling or home of the non-participating manufacturer, importer, licensed agent, tobacco distributor, wholesale dealer and jobber, retailer dealer, person engaged in delivery sales, or cigarette rolling machine operator. An application for license under part 10 of this chapter being declared an express waiver of such claim.

(e) All non-participating manufacturers, importers, licensed agents, tobacco distributors, wholesaler dealer and jobbers, retailer dealers, persons engaged in delivery sales, or cigarette rolling machine operators failing to permit the examination of tobacco products, invoices, books and other memoranda, including the general books, both operating and proprietary ledgers, and other records, or interfering with the orderly inspection or examination thereof, or failing to file such reports as may be required by the commissioner, commit a Class A misdemeanor.

67-4-2609. Any duly authorized representative, agent or employee of the department who has been designated by the commissioner to enforce this part is authorized and empowered to execute search warrants and do all acts incident to the

search warrant, in the same manner as search warrants may be levied by sheriffs and other peace officers.

67-4-2610.

(a) Inspectors, agents, representatives or officers appointed by the commissioner shall be clothed with and have the duty, power and authority as police officers to enforce this part.

(b) The highway patrol shall likewise have concurrent authority to assist in the enforcement of this part.

(c)

(1) Any duly authorized representative or employee of the department who has been specifically designated by the commissioner to enforce this part, is authorized and empowered to go armed, or carry a pistol while on active duty engaged in enforcing this part.

(2) Any such duly authorized representative or employee of the department who has been designated by the commissioner to enforce this part is authorized and empowered to execute search warrants and do all acts incident to the search warrant, in the same manner as search warrants may be levied by sheriffs and other peace officers.

(d) Nothing in this part shall be construed to limit the authority of the department of revenue or the attorney general's office as otherwise provided by law.

SECTION 10. Tennessee Code Annotated, Section 67-4-2602(d), is amended by deleting the subsection in its entirety and by substituting instead the following:

(d)

(1) A non-participating manufacturer shall not be included or retained in the directory of approved tobacco product manufacturers until it has posted a bond in accordance with this subsection (d), in addition to any other requirements for inclusion in the directory contained in this part.

(2) The bond required by this subsection (d) shall be posted by corporate surety located within the United States. The amount of the bond shall be the greater of one hundred thousand dollars (\$100,000) or the greatest required escrow amount due from the non-participating manufacturer or its predecessor for any of the twelve (12) preceding calendar quarters.

(3) The bond shall be written in favor of the state of Tennessee and shall be conditioned on the performance by the non-participating manufacturer of all of its escrow deposit and other financial obligations under this part and § 47-31-103.

(4) If the non-participating manufacturer has failed to make or have made on its behalf escrow deposits equal to the full amount owed for a quarter within fifteen (15) days following the due date for the quarter, the state may execute upon the bond in the amount equal to any remaining amount of escrow due. The amount collected may be deposited into the state treasury and shall reduce the amount of escrow due from that non-participating manufacturer by the dollar amount collected.

(5) If the state obtains a judgment against the non-participating manufacturer for the non-participating manufacturers failure to make an escrow deposit, the state may also execute on the bond to recover the amount of civil penalties and attorneys' fees obtained in that judgment. Funds collected from

such bonds shall be counted first toward the amount of escrow due but not deposited into escrow by the non-participating manufacturer.

SECTION 11. Tennessee Code Annotated, Section 67-4-2604, is amended by deleting subsection (e) in its entirety and by redesignating the subsequent subsections accordingly.

SECTION 12. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this act is for any reason held to be invalid, unlawful or unconstitutional, such decision shall not affect the validity of the remaining parts of this act.

SECTION 13. Section 10 of this act shall take effect October 1, 2014, the public welfare requiring it. All other sections of this act shall take effect upon becoming a law, the public welfare requiring it.